IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No.

DESPATCH SHOPS, INC.,

Petitioner,

against

VILLAGE OF EAST ROCHESTER, GEORGE SCHREIB, Mayor of the Village of East Rochester, LEE ARCURI, HAROLD L. BRAINERD, HAROLD KITCHEN and LLOYD V. WOOD, the last four being Trustees of the Village of East Rochester,

Respondents.

BRIEF

Petitioner's contention in its application to this Court for a writ of certiorari is that by reason of the circumstances surrounding this proposed municipal project, the petitioner has been treated in a patently arbitrary and unconstitutional manner. Such contention is based upon the conceded facts that despite its being the largest taxpayer in the Village, as well as the largest consumer of electric power, it is excluded from any possible service from this proposed municipal electric plant and system, and yet under the constitution and laws of the State of New York and the very terms of the initiatory ordinance itself, its property, assessed at $400,000 out of a total

assessed valuation for the village of $5,829,790 (p. 156-157), is made subject to levy and assessment for taxes to make up any deficit arising from the construction and operation of the proposed plant.

It is difficult to conceive of a more glaring example of subjecting a taxpayer to stand behind a project without the possibility of receiving any benefit therefrom. Thus, we submit, the proposal falls within the express condemnation enunciated by decisions of this Court of which *Myles Salt Co.* v. *Iberia & St. Mary Drainage Dist.*, 239 U. S. 478, is a leading example.

We wish to emphasize that this petitioner does not contend that Article 14-A of the General Municipal Law of the State of New York (added by Chap. 281 of the Laws of 1934) *is unconstitutional.* However, **"the law as [it would be] administered and [as such administration has been] justified by the [Court of Appeals] of the state is attacked, and it is asserted to be a violation of the Constitution of the United States"** (*Myles Salt Co.* v. *Iberia & St. Mary Drainage Dist.*, 239 U. S. at p. 484).

As is well known, the constitutionality of a statute depends, not so much on abstract theories of philosophy, but upon a very practical application of laws to the facts, and a statute which is valid as to one set of facts may be invalid as to another. Likewise a statute which generally is not within any constitutional prohibition may become invalid by reason of burdensome or unreasonable application to the conditions to which it is applied (*Nashville, Chattanooga & St. Louis Ry.* v. *Walters*, 294 U. S. 405, 414, 415). And we maintain that Article 14-A of the General Municipal Law, under the project as proposed by the respondent-Village and as sanctioned by the State Court rulings, has been applied in a grossly invalid and unlawful manner so as to violate the rights of petitioner

as protected by the Fourteenth Amendment to the Constitution of the United States.

Basically, the facts and circumstances in the instant case cannot be distinguished from those existing in the *Myles Salt Co.* case, *supra*. There a drainage district was created for the construction and maintenance of a project for the purpose of draining certain lowlands in southwest Louisiana. The State statutes permitted the creation of such districts when in the opinion of the police juries of adjoining parishes such a district was necessary. Included in the district, however, was certain land, known as Weeks Island, which was not lowland, but was in fact one of several islands of "the highest uniform elevation above sea level in southwest Louisiana." The topography of this Island was high and rolling, and in lieu of needing drainage the problem was to guard against washing and erosion. Weeks Island was the highest assessed piece of property in the district and could not possibly benefit from the project. An election was held and the proposition to impose an *ad valorem* tax of five mills on all property within the district (including, of course, Weeks Island), to pay for bonds to be issued by the district, was carried.

The Salt Company, which owned and worked the Island, refused to pay the tax and brought suit to restrain the sale of its lands for such non-payment. The State Courts dismissed its petition, but upon error to this Court, the Company's position was sustained. It was held that the scheme there called into question came within the limitation on state power and that it was a flagrant abuse of such power. This Court said:

> "It is to be remembered that a drainage district has the special purpose of the improvement of particular property, and when it is so formed to in-

> clude property which is not and cannot be benefited directly or indirectly, including it only that it may pay for the benefit to the other property, there is an abuse of power and an act of confiscation. *Phillip Wagner* v. *Leser, supra* [239 U. S. 207]. We are not dealing with motives alone, but as well with their resultant action; *we are not dealing with disputable grounds of discretion or disputable degrees of benefit, but with an exercise of power determined by considerations not of the improvement of plaintiff's property, but solely of the improvement of the property of others,—power, therefore, arbitrarily exerted, imposing a burden without a compensating advantage of any kind*" (239 U. S. at p. 485; italics supplied).

In the present situation we have the Village officials proposing to construct a municipal electric generating plant and distribution system, purporting to act pursuant to a delegation of authority by State statute (Article 14-A of the General Municipal Law). The ordinance initiating the project describes it as one to authorize the "construction of a public utility service for the purpose of generation, furnishing and transmission of electricity for light, heat and power to the Village of East Rochester or for compensation to its inhabitants * * *" (R. 26) and to provide for the issuance of bonds of the Village not to exceed $360,000 to finance the project (R. 28).

Actually, however, as conceded at the trial, the plant provided for in the plans and specifications, upon which the proposal as submitted to the electors was based, would not have sufficient generating capacity to supply petitioner, Despatch Shops, Inc. Furthermore, the reports of the engineers retained by the Village officials to study the feasibility of establishing a municipal electric plant and system for the Village and the plans and specifications prepared by them excluded petitioner as a possible user.

Thus we have an instance of direct and express exclusion of the petitioner, whose land in the Village as found by the Trial Court, "occupies a distinct area of approximately eight acres in the Village of East Rochester," (R. 169) from any and all benefit from the proposed project.

Despite this exclusion the ordinance in question provides:

> "A sufficient tax shall be levied each year to pay the principal of and interest on said bonds as the same shall become due to the extent, if any, that funds are not available for the purpose from revenues of the Project. The faith and credit of said Village are hereby pledged for the payment of the principal of and interest on said bonds." (R. 29).

Such a provision had to be included in accordance with State Constitutional requirements.

> N. Y. State Constitution, Art. VIII, Sect. 2;
> *Matter of Tierney* v. *Cohen*, 268 N. Y. 464;
> *New York Edison Company, Inc.* v. *City of New York*, 268 N. Y. 669.

Hence, although specifically excluded from all benefit from the project, petitioner's property—the largest assessed in the community—is expressly made subject to levy and assessment, along with all other taxable property in the Village, to make up any deficits that may occur in the operation of the venture. Under such circumstances it would seem unquestioned that such is "palpably arbitrary, and therefore a plain abuse of power, [and] it falls within the condemnation of the due process clause (*Houck* v. *Little River Drainage Dist.*, 239 U. S. 254, 262, 265; *Valley Farms Co.* v. *Westchester County*, 261 U. S. 155); and * * * manifestly and unreasonably discriminatory

[and] it falls within the condemnation of the equal protection clause (*Gast Realty & Invest. Co.* v. *Schneider Granite Co.*, 240 U. S. 55; *Kansas City S. R. Co.* v. *Road Improv. Dist.*, 256 U. S. 658; *Thomas* v. *Kansas City S. R. Co.*, 261, U. S. 481; *Road Improv. Dist.* v. *Missouri P. R. Co.*, 274 U. S. 188)." (*Memphis & Charleston Railway Co.* v. *Pace*, 282 U. S. 241, at p. 246).

And yet the New York Courts have determined that the imposition of a tax against petitioner in these circumstances would not be "arbitrary or discriminatory" (See opinion of majority of Court of Appeals, R. at p. 697). We respectfully submit, as the dissenting Judges point out (See dissenting opinion, R. at p. 700), that the subjection of petitioner's property to taxation under the circumstances found to be present in this case, where "the project will afford to other inhabitants of the Village special benefits which are denied to Despatch Shops, Inc., although that corporation may be called upon as a taxpayer to meet its share of the cost and maintenance of the plant * * * will result in an unconstitutional taking of property through illegal taxation. (See *Myles Salt Co.* v. *Iberia Drainage Dist.*, 239 U. S. 478, 485.)"

In the only other instance in New York State where something similar to the plan formulated by the Village of East Rochester was attempted, the attempt was struck down by the Court of Appeals. Reference is made to *Gaynor* v. *Marohn*, 268 N. Y. 417. There the State Legislature passed a Power Authority Act for Albany County by which it created a power district, which specifically took in all the territory in the county except four towns which were excluded. There, as in the present case, the bonds to be issued to finance the project were to be payable in the first instance out of the Authority's funds; but

it was further provided that "such bonds shall be a county charge and the board [of supervisors] may if necessary levy general county taxes for the payment of the principal and the interest thereof" (N. Y. Laws 1935, Chap. 842. Sect. 14).

The Court of Appeals held the Authority Act unconstitutional, insofar as it authorized the County to issue bonds which would become a charge upon the property, by reason of taxation, within the terms of the Act excluded from all benefit from the project. In so ruling the Court of Appeals, in line with the decisions of this Court, said:

> "* * * the county * * * cannot use county money raised by taxing an excluded district to pay for the lighting or for furnishing of power within a restricted district within the county. (*Village of Kenmore* v. *County of Erie*, 252 N. Y. 437.) * * * property without the district cannot be taxed to pay for benefits within it. (5 McQuillin on the Law of Municipal Corporations, p. 575, §§ 2166-2169.) Only such land as is included in the district can be assessed." (268 N. Y. at p. 428)

The Court in that case further said (at p. 430):

> "In a word, we may state the law to be this: The State may authorize cities, villages or counties, as it has done by the provisions of the General Municipal Law, to establish lighting and power plants and systems. So, too, it may create power districts for this purpose, whether they embrace a county, or a portion of a county, or many counties, but the money to be raised for this purpose, if it is to come from taxation, must be limited to a tax or assessment upon the property benefited. For instance, the county of Albany cannot be taxed for the purpose of lighting the county of Rensselaer, which goes untaxed."

In this case, review of which by this Court is sought by this petition, the majority of the Court of Appeals passed over the decision in *Gaynor* v. *Marohn* without even so much as mentioning it, although it is clearly indistinguishable from the situation presented in the instant case as well as the past decisions of this Court discussed above.

Conclusion

The petition for a writ of certiorari to the Court of Appeals of the State of New York, directing that Court to certify and send to this Court for its review and determination a full and complete transcript of the record and the proceedings had herein, to the end that the cause may be reviewed and determined by this Court should be granted.

Respectfully submitted,

DANIEL M. BEACH,
Attorney for Petitioner.

DANIEL M. BEACH,
PAUL FOLGER,
Of Counsel.